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INDEX.

ARGUMENT.

CITATIONS

CASES

STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938

No. 360

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

CHARLES F. TOWERY, IN HIS OWN RIGHT AND AS ADMINISTRATOR OF THE ESTATE OF ROBERT C. TOWERY, DECEASED,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF

OPINION BELOW.

Towery v. *U. S.*, 97 F. (2d) 906.

STATEMENT.

A misapprehension in petitioner's statement as to the basis of the decision being reviewed should be corrected.

The opinion below was not that the insured was entitled to 240 installments only, nor that the named beneficiary was entitled to any definite number of installments, but the court was dealing with the rights of the parties to this particular case, where the insured had died before maturity of the entire 240 installments and where the named beneficiary is still living. Therefore, the court saw no necessity to state that under other circumstances, here immaterial, an insured who remained totally and permanently disabled more than 240 months would continue to be entitled to benefits thereafter, nor that upon the death of a named beneficiary before the maturity of all death benefit installments, the then commuted value of the unmatured balance of death benefits would then be payable at once to the estate of the insured as successor beneficiary.

Petitioner errs, however, in its footnote statement (Bf. 8) that no basis exists for a distinction between the beneficiary and the insured or his personal representative as to the determinability of the amounts payable. The distinction is that it can never be determined in advance whether anything more in disability benefits will ever accrue or become payable to anybody, whereas death of the insured makes it certain that the unmatured balance of the 240 installments will become payable as death benefits to the named beneficiary or his successor. The fact that the successor will be the administrator of the insured instead of the administrator of the beneficiary does not make the obligation any more uncertain than it would be if the law provided that the unpaid installments should go to the administrator of the beneficiary, and the provision for immediate payment of the commuted value would not render the obligation uncertain any more than the negotiability of an interest bearing note payable in installments on or be-

fore the first of each month would be destroyed by the possibility that the maker might pay the entire principal at any time and thereby lessen the amount of interest that the holder would receive. However, even if petitioner's assertion that there is no basis for distinction is sound, it is entirely immaterial here, as it would merely give the instant beneficiary an unneeded longer limitation period as to some of the installments.

SUMMARY OF THE ARGUMENT.

I.

(a) Six year limitation as to claim of beneficiary runs only from death of insured, not from happening of total permanent disability.

(b) A separate six year limitation as to each installment of total permanent disability benefits runs only from the due date of such installment.

II.

As all installments maturing on or after October 3, 1926, were recoverable free from the limitation bar, the reversal of the District Court judgment was proper.

ARGUMENT.

I.

(a) When the insured died, April 22, 1927, his insurance was still in force and effect if he became totally and permanently disabled during the period for which premiums had been paid or within the grace period thereafter. If he had lived he would have had by statute (Sec. 19 World War Veterans' Act 1924 as amended, Secs. 445 and 445d, Tit. 38, USCA) until July 3, 1931, in which to file his claim with the Veterans' Administration for total permanent disability benefits, and, to institute suit therefor, an additional period depending on the delay of the Veterans' Administration in passing on his claim. He therefore still had a valid existing contract of insurance at the time of his death, and if the administrator and beneficiary had filed a claim for total permanent disability and death benefits, respectively, before August 15, 1930, beyond question the suit would not have been barred by the statutory limitation period of one year from July 3, 1930, or six years after the right accrued for which the claim is made, whichever is the later date, under the statutory definition that the right shall be deemed to have accrued on the happening of the contingency on which the claim is founded. The trouble with this statutory definition is that it does not define anything, but itself is in need of definition just as much as the term which it purports to define. It has served, therefore, only to confuse instead of to clarify. There are, of course, several contingencies that must have happened in order to give a beneficiary any valid

claim whatever. (1) Insurance must have been applied for and granted while the insured was in the army. (2) The insured must have become totally and permanently disabled, or died, while the policy was in force. (3) The beneficiary must have been designated as such by the insured and have continued to be such duly designated beneficiary until the death of the insured. (4) The insured must have died. If one of these contingencies has failed to happen the alleged beneficiary has never acquired any valid claim. In that sense, any one of these contingencies might be taken as the contingency upon which the claim was founded as well as any of the others. However, it would seem logical to hold that the happening of the contingency on which the claim of the beneficiary is based, which made his cause of action accrue, was the happening of that one of the contingencies which gave him an existing immediate right to demand and be paid insurance benefits, and not merely the happening of some contingency which only created a possibility that said beneficiary might at some time in the future acquire such a claim. So construing the statute, the right of the beneficiary could never accrue until death of the insured and it would be wholly immaterial whether the insurance was kept in force until that death by payment of premiums or by total permanent disability commencing during the period for which premiums were paid. The beginning of total permanent disability could, of course, give no immediate right of action to the beneficiary and, in fact, no right of action at all, because until the death of the insured the beneficiary could make no valid claim for payment of insurance benefits and no such benefits could lawfully be paid to *him*, and, indeed, there would be no assurance that *he* would ever have any such valid claim, for he might die before the insured or the insured might file a change

of beneficiary which would substitute an entirely different person as beneficiary, or by collecting 240 monthly installments of disability benefits the insured might terminate the provisions of the insurance contract for payment of death benefits.

It is an almost axiomatic principle of law that a statutory limitation can never commence to run against a cause of action until there is a person capable of presenting such cause of action for enforcement to some official or tribunal (judicial or administrative) having power to pass upon the claim.

There is an exact parallel, so far as the limitation provisions are concerned, between the claim of a war risk insurance beneficiary and a death claim under the Federal Employer's Liability Act (Sec. 56, Tit. 45 USCA; c. 149, Sec. 6, 35 Stat. 66; c. 143, Sec. 1, 36 Stat. 291), which provides that "no action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued." True, in the former the limitation provision does, and in the latter does not, contain the meaningless attempt at definition to the effect that the cause of action shall be deemed to have accrued upon the happening of the contingency upon which the claim is based, but that adds nothing to the word as it stands without definition, and it has been decided that the cause of action for death under said Liability Act does not accrue until death, regardless of the time intervening between injury and death.

> *B. & O. S. W. R. Co.* v. *Carroll*, 280 U. S. 491, 494-5.

By analogy the following decision is applicable also:

> "A different construction of the statute would lead to the anomalous result that an owner of land whose title appeared to be unquestioned would be

prevented from recovering it if he did not bring suit within seven years after he acquired title against persons who during such seven years had neither asserted any claim to the land nor held adverse possession of it nor otherwise invaded his rights; that is, that his suit would be barred before any cause of action had accrued on which he could have brought suit. This, manifestly, was not intended."

Grayson v. *Harris*, 279 U. S. 300, 304-5.

The opinion of the Court of Appeals in the instant suit states hypothetical cases showing the absurdity of petitioner's theory that the happening of the contingency on which the claim of the beneficiary is based is the beginning of total permanent disability instead of death. A few additional examples will still further emphasize that absurdity and show that such theory would in some cases bar a claim by limitation even before its maturity. For instance, suppose an insured had become totally and permanently disabled January 1, 1925, had filed his claim and had it allowed July 1, 1925, and the government had continued to pay him total permanent disability benefits to and including August 1, 1931, but on September 1, 1931, had refused to pay any further disability benefits and had notified him of such refusal alleging as reason therefor that he was no longer totally and permanently disabled. If he died thereafter on the same September 1, 1931, the claim of the beneficiary, according to the government's theory, would be barred before it became a claim, for more than six years had elapsed between the beginning of total permanent disability and the date of death and that death occurred after July 3, 1931. If we add another element to such hypothetical facts and assume that there was a change of beneficiary August 1, 1931, the claim of such new beneficiary according to the government's theory, would be

barred even before *he* was designated as a beneficiary, notwithstanding it was the privilege of the insured to make a change of beneficiary whenever desired. If we vary the facts in either of those examples to assume that the insured died August 3, 1931, without any refusal of payment having been made and that the beneficiary filed *his* claim on the same day for death benefits, the theory of the government would still bar the latter claim. It is not to be supposed that Congress intended any such absurd result. The government's theory simply will not work logically, but the theory that when the insured had an enforceable contract of insurance at the time of his death only such death starts the limitation period running against the beneficiary will work out logically in every case and will not conflict with the usual principles applying to statutes of limitations. According to the ordinary rules of statutory construction, a statute will be construed so as to give it a reasonable, logical meaning which will avoid hardship, rather than an absurd or illogical meaning or one which will create hardship.

> "Nothing is better settled than that statutes should receive a sensible construction such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion."
>
> *In re* Chapman, 166 U. S. 661, 667.
> *Lau Ow Bew* v. *U. S.*, 144 U. S. 47, 59.

> "Where a particular construction of a statute will occasion great inconvenience or produce inequality or injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."
>
> *Knowlton* v. *Moore*, 178 U. S. 41, 77.

> "If there are no means of avoiding such an interpretation of the statute, a judge must come to

the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but to my mind a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an Act of Parliament; and, unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended."

Plumstead B. of W. v. *Sprackman*, L. R. 13 Q. B. D. 878, 887.

We see no reason for treating war risk insurance contracts differently, in considering the limitation period for suit thereon, from any other installment contract, and the rule is well settled that in other contracts the limitation begins to run as to each installment from the due date of that installment and not from the due date of the first installment, even where the liability is a fixed one as to all installments and not contingent.

Pac. M. L. I. Co. v. *Jordan*, 190 Ark. 941, 946-7; 82 S. W. (2d) 205.

Heakes v. *Heakes*, 157 Ga. 863, 867-8; 122 S. E. 777.

Simonton v. *Simonton*, 33 Ida. 255, 265; 193 Pac. 386.

Schuler v. *Schuler*, 209 Ill. 522, 527; 71 N. E. 16.

Madison v. *Wedron S. Co.*, 352 Ill. 60; 184 N. E. 901.

Hamlin v. *Race*, 78 Ill. 422.

" 'Cause of action' includes every fact necessary for the plaintiff to prove to entitle him to succeed,—every fact that the defendant would have a right to traverse. It has been said to be the right to prosecute an action with effect. * * * The terms 'right of action' and 'cause of action' are equivalent expres-

sions. * * * 'By this phrase (cause of action) is understood the right to bring an action, which implies that there is some person in existence who can assert and also a person who can lawfully be sued. * * * There is no cause of action till the claimant can legally sue. * * * If he have no legal right to sue, he has not merely a bad cause of action, but no cause of action.' * * * A cause of action accrues when facts exist which authorize one party to maintain an action against another. * * * It is not possible for one at the same time to have a cause of action and not to have the right to sue. The statutory notice is as essential to the plaintiff's cause of action as is a demand in replevin of a defendant whose possession was originally lawful and who has done nothing to make it unlawful."

Walters v. *City*, 240 Ill. 259, 263-4; 88 N. E. 651.

Save for the statutory definition of "accrued" probably none would dispute the applicability of the ordinary rule to war risk insurance installments. For our part we think the definition in question adds nothing to the usual meaning of the word "accrued," but if the homage we are accustomed to pay to the rule of construction which requires us, if possible, to give some special meaning to every word in a statute and to reject nothing as surplusage, forces us to find some special meaning for the words used in the definition which will give the statute a meaning other than what it would have with the definition left out, there will still be no insurmountable obstacle. For we resolve the difficulty thus: Without the definition the cause of action would not accrue until there had been an administrative disagreement, because, until such disagreement, no court would be open for suit, thereby giving the claimant six years from date of disagreement for suit on installments long past due and enabling him to postpone the statutory bar indefinitely

by delay in filing claim with the administrative body charged with passing on it. To prevent such a result Congress defined "accrued" as the happening of the contingency on which the claim is based, thus starting the limitation period running on the due date of the installment and making it impossible for the claimant to delay suit by delay in filing his claim, except for the six-year limitation period, and placing responsibility for any further extension upon the delay of the administrative body in passing on the claim.

Anyway, the rule against treating any words of a statute as surplusage unless it is unavoidable furnishes no help to petitioner, because we are not concerned with the question of giving effect to, or ignoring, any part of the statute, but merely with the meaning of a part of the statute to which we are to give effect. The doctrine in question, relied on by the government in the Court of Appeals, in no way aids it in its contention that a meaning should be given to the words contrary to the meaning generally given to such words when used in a similar connection in other statutes, as, for instance, in the Federal Employer's Liability Act heretofore discussed.

As to the possibility suggested by petitioner (Bf. 26) of a beneficiary bringing suit 26 years after date of total permanent disability, we refuse to be drawn into an argument over a contention which we are not making. We have contended that the happening of the contingency on which the claim of the beneficiary is based which starts the six-year limitation period running on that claim is the death of the insured, and that is the only argument we are making as to the claim of the beneficiary. As that death occurred April 22, 1927, and the suit was filed within the immediately ensuing period of six years, plus the time from February 11, 1932, to August 8, 1935, during which the claim was pending

in the Veterans' Administration, we are not concerned with any question as to whether, under some circumstances, the claim of the beneficiary might not be outlawed until the expiration of 26 years, or any other period not involved in the instant suit. In any event, when petitioner entered into a contract providing for payments extending over a period of twenty years or longer, it should be prepared to defend a suit brought within the statutory limitation period of six years after the due date of the installment demanded and preserve its evidence to meet such a suit. Moreover, it is obvious that if anybody is hurt by the long period to be covered, it is the claimant, who seldom has the means to locate witnesses and produce evidence covering the early part of the period, and not the government with its copious records and its unlimited funds to use in locating witnesses and discovering evidence. The colossus needs no protection against the midget.

As Congress has not taken away any right of the beneficiary under the insurance contract in the instant suit, we fail to see any point to petitioner's argument (Bf. 26-7) that the beneficiary is merely a volunteer whose said rights may be taken from him by Congress and given to others.

In the final analysis petitioner must stand or fall as to the entire case on the decision in *U. S.* v. *Tarrer,* 77 F. (2d) 423 (CCA 5). That decision ought not to be followed, because it construes a limitation provision strictly in favor of the government, instead of, according to the weight of authority [*U. S.* v. *Lund,* 76 F. (2d) 723, 724-5 (CCA 7); *U. S.* v. *Tyrakowski,* 50 F. (2d) 766, 767 (CCA 7); *Ford* v. *U. S.,* 44 F. (2d) 754, 755 (CCA 1); *U. S.* v. *Cox,* 24 F. (2d) 944 (CCA 5); *McNally* v. *U. S.,* 52 F. (2d) 440 (CCA 8); *U. S.* v. *Phillips,* 44 F. (2d) 689 (CCA 8); *Glazow* v. *U. S.,* 50 F. (2d) 178 (CCA 2);

U. S. v. *Le Page*, 59 F. (2d) 165 (CCA 1); *U. S.* v. *Arzner*, 287 U. S. 470; *White* v. *U. S.*, 270 U. S. 175], liberally in favor of the insured and his beneficiary, and also because it is illogical and based on a wrong theory, in that it assumes that the beneficiary derives any rights he has from the insured and says that to hold that the cause of action of the beneficiary accrued at date of death, instead of at the beginning of total permanent disability, would establish a limitation period for rights accruing to the insured and at the same time leave without any limitation a suit by the beneficiary. Obviously, if the cause of action of the beneficiary accrued at the date of death it would be barred six years after the date of death and would not be left without any limitation. The case has also been receded from as far as necessary to hold the claim not barred in a later case in the same Circuit, and apparently the only reason why it was not overruled altogether was because a decision in favor of the beneficiary in the later case did not so require.

> "* * * nothing in the statutes or decisions lends support to the view that the right of one claimant depends upon, or is affected by, the filing or failure to file claims or suit by another. * * *
>
> Here the fact of the occurrence of total and permanent disability while the policy was in force, if established in a suit timely brought by the representative of the insured and his beneficiary, would have supported a judgment in favor of the former for payments accrued before the insured's death, and one in favor of the latter for payments accruing afterwards. Nothing in the statutes or the decisions lends support to the view that because one of these causes of action was allowed to become barred, the other, though timely filed on, could not be sued. Plaintiff brought her suit in time; neither action nor inaction on the part of the representa-

tive of the insured ought to, nor do we think it could, affect her right to recovery. * * *

The new beneficiary does not take by inheritance from the insured, nor otherwise claim as a successor of his right, but takes directly under the policy, just as the remainderman does not take under the life tenant but under the instrument which created the rights of both. The new beneficiary's right of action is founded upon the policy and not upon the right of the insured to collect installments during his disability until death. * * * He has as beneficiary nothing to do with installments which accrued before death. His independent claim arose and could be enforced only at the insured's death. That limitation may since have run against the insured as to the installments owing to him is unimportant."

Ivy v. *U. S.*, 84 F. (2d) 37, 39, 39-40.

It was contended by petitioner below that the latter paragraph of the foregoing quotation was a portion of a specially concurring, but really dissenting, opinion of Judge Sibley. It was not such in fact, not being one of those decisions where a judge concurs merely in the result, but for an entirely different reason, and dissents from the language and reasoning of the majority opinion, but an examination of both opinions will show that all of the judges were in accord and that Judge Sibley merely wanted to state the matter in language which seemed to him more clear or more emphatic. There is no more reason for calling his concurring opinion a dissenting one than there would be in some of the English cases where each of perhaps five judges writes a separate opinion, in selecting one of them as the opinion of the court and calling all the others dissenting opinions. There is no conflict between the two-judge opinion and the one-judge opinion.

The admission in petitioner's brief (p. 27) that "the

insured may change the beneficiary at any time" is quite significant as an indication of the fallacy of the contention made in the next sub-head of that brief where petitioner argues that when total permanent disability "accrues while the insurance is in force, the insurance itself ceases, since there is substituted for it the matured obligation" to pay benefits, and also the fallacy of a similar argument made later in petitioner's brief (p. 31). If the insurance thus ceases, how is it that the right to change the beneficiary continues? If it so ceases, how is it that, if the disability later on ceases to be total, or ceases entirely, the insured may resume payment of premiums and still have a valid insurance contract which may again ripen into a government obligation to pay disability or death benefits at some time in the future and which will continue in force as originally issued for two years without conversion (W. W. V. Act, Sec. 512, Tit. 38, USCA; see appendix)? What of the express statute that "All yearly renewable term insurance shall cease on July 2, 1927, except when death or total permanent disability shall have occurred before July 2, 1927" (W. W. V. Act, Sec. 512, Tit. 38, USCA pocket part; see appendix)? No, the theory that when the disability occurs the insurance is at an end will not stand the test of logic.

This also disposes of petitioner's contention that once total permanent disability occurs a single indivisible obligation arises to pay a fixed amount which becomes definitely payable, regardless of the persons between whom it may be apportioned. If an insured recovered a judgment in 1920 for total permanent disability benefits and through discovery of a cure in 1922 for what was formerly thought to be an incurable disease, ceases to be totally and permanently disabled, what becomes of the alleged single indivisible obligation to pay 240 installments? Certainly, if he does not resume payment of

premiums, the insurance will lapse and nothing more will ever become payable. Just as certainly, if he resumes payment of premiums, he will have a contract of insurance in force which is of just as much validity as to him as when it first came into existence,—one under which he will again become entitled to benefits payable throughout his life, be it 20 or 40 years, if he again becomes totally and permanently disabled while it is in force, and under which his beneficiary may or may not be entitled to death benefits, depending on whether the insured lives until maturity of the 240th installment and on whether or not he continues to pay premiums until his second total permanent disability begins. How can it be said that all these various contingent liabilities are not severable obligations but constitute one single indivisible obligation?

Petitioner's contention that there is a parallel between respondent's rights as beneficiary and as administrator ignores the fact that the former accrues to him in his own right and the latter in a representative capacity, in which latter capacity he is barred by anything that would bar the insured whose representative he is.

The conclusion sought to be drawn by petitioner (Bf. 31) from the statutory use of the words "right" and "contingency" in the singular is unsound. It will be noticed that the limitation provision of the statute says "after the right accrued *for which the claim is made.*" (Italics ours.) Far from supporting petitioner's contention, this recognizes that there are many different and distinct rights for which as many separate claims may be made, perhaps a separate one for each installment of insurance benefits, and seems to provide that each shall have its own six-year limitation period.

Petitioner's citation of *U. S.* v. *Boyett,* 92 F. (2d) 438 (Bf. 28) is pointless, as it is not a limitation case.

In its desperation, petitioner resorts (Bf. 33-5) to the argument that because Congress provided that "all persons having or claiming to have an interest in such insurance may be made parties to such suit" when any claimant sues, therefore Congress must have intended total permanent disability, and not death, to be regarded as the contingency and the claim to be a single indivisible one. When it is realized that joinder of a beneficiary, who paid no premiums, is authorized when the administrator of the insured sues, even merely for a return of premiums, all substance, *if any*, to the theory is destroyed.

Petitioner cites (Bf. 35-6) *Tyson* v. *U. S.*, 297 U. S. 121, 123, *Munro* v. *U. S.*, 303 U. S. 36, and many Court of Appeals cases, in support of its contention that until the instant decision it has been uniformly assumed that its theory as to limitations is sound. If that is so, it is only because the question was never raised in any of those cases and a question not raised is not decided. In all of those cases, the controversy concerned the interpretation of the plaintiff's rights under the "one year after July 3, 1930," limitation and no contention was made that the six-year limitation would save some of the installments. What was said in the opinions about the latter was merely by way of recital of the words of the statute. For instance, in *Tyson* v. *U. S.*, 297 U. S. 121, 123, the words which petitioner omits from its quotation are "or within one year after July 3, 1930," and the decision, as well as the only point argued, as an examination of the briefs will show, was that where claim was filed July 3, 1931, the suspension of the one-year limitation would expire on the very day of decision. Likewise, in *Munro* v. *U. S.*, 303 U. S. 36, the only point raised or decided was merely that mere service of summons, without service of complaint, would not toll the statute

and the decision was so limited for the reason that, as the opinion recites (p. 39), "by concession it was necessary to bring suit not later than July 1, 1933."

In support of its argument for strict construction of the limitation provision as applied to waiver of sovereign immunity to suit, petitioner ignores the cases heretofore cited (p. 13) announcing the rule supported by the weight of authority and cites cases not in point at all, or else those adhering to the minority rule (Bf. 37). To this end petitioner cites *Kemp* v. *U. S.*, 77 F.(2d) 213 (CCA 7), and raises the implication that the latter overrules *U. S.* v. *Lund*, 76 F.(2d) 723 (CCA 7). Of course, the court had no such intention, for the *Lund* case was not even mentioned in the *Kemp* case, either in any brief or in the opinion. The *Kemp* case had nothing whatever to do with the question involved in the instant case as to when an action shall be deemed to have accrued, but decided, first, that there was no jurisdictional disagreement because no insurance claim had ever been filed, and second, that if it had been filed the first suit was commenced before there was any disagreement and was dismissed *voluntarily* by the plaintiff, instead of for failure of process, and the second suit was commenced, admittedly, after the statutory limitation period had expired and it was sought to avoid the bar of the limitation under the statute giving an additional year after dismissal to institute suit where a suit seasonably instituted had failed through defect of process or similar circumstances not affecting the merits. All that the court decided was that a *voluntary* nonsuit does not give the right to institute a new suit within the year,—a decision in accord with the universal rulings of all courts, state and federal, construing similar nonsuit provisions. What was said about construing statutes strictly which relax sovereign immunity from suit, was

evidently intended to apply to the institution of a war risk insurance suit without a previous claim or disagreement, or perhaps to the filing of a second suit solely because of dismissal of the first suit, and there was no intention of overruling the *Lund* case or adopting any rule of strict construction of limitation provisions against plaintiffs in war risk insurance suits. The cases cited in the *Kemp* decision were not war risk insurance suits, but *U. S.* v. *Michel*, 282 U. S. 656, was an income tax refund case brought by a living taxpayer after the limitation period had run; *Eastern T. Co.* v. *U. S.*, 272 U. S. 675, was an admiralty suit where Congress authorized suit against the United States where a private ship owner could have been sued under similar circumstances, and had nothing to do with limitations; *Price* v. *U. S.*, 174 U. S. 373, had nothing to do with limitations, but held the statute authorizing suit against the United States on account of property taken or destroyed by Indians did not authorize suit for mere consequential damages resulting to the owner of property so taken, but not directly caused by the Indians, where the loss of the oxen taken made it necessary to sell the property not taken at a low price because there was no other means of transporting it to market. *Schillinger* v. *U. S.*, 155 U. S. 163, was not a limitation case, but merely holds that in authorizing suit against the United States on contract obligations Congress did not authorize suit for a tort.

The other cases cited by petitioner (Bf. 37) on the strict construction doctrine are inapplicable to the question involved in the instant case and are by courts adhering to the strict construction doctrine in war risk insurance suits. Furthermore, in *U. S.* v. *Valadza*, 81 F. (2d) 615, 617, the real point was as to the necessity of pleading the statutory limitation. *U. S.* v. *Arditto*,

86 F. (2d) 787, 788, decided merely that where a claim had been filed and denied before the effective date of the amendatory Act of July 3, 1930, the limitation period established by that Act was not to be extended for a period equivalent to the time of such pendency of the claim in the Veterans' Bureau. *Fletcher* v. *U. S.*, 92 F. (2d) 713, 717, was not a war risk insurance suit at all, nor applicable to the instant case, and even at that did not announce a universal rule of strict construction of statutes giving a right to sue the United States, but merely held that "generally" they were to be construed strictly.

(*b*) The same general principles should be applied to the claim of the administrator. No right of action accrued to anybody as to any particular installment until the due date of that installment. On February 11, 1932, when the administrator filed his claim for the installments of total permanent disability benefits which became due each month up to the date of death, the six-year limitation period had not run on any monthly installment which became due on or after February 11, 1926, and therefore the administrator had an enforceable claim which had not been barred. It would seem that as to the claim of an insured for total permanent disability benefits, the happening of the contingency on which the claim for each installment is based ought to be considered the maturity of that particular installment; otherwise, the claim of an insured for any installment maturing after July 3, 1931, and more than six years after the beginning of total permanent disability would be barred, even though a claim for total permanent disability benefits had been made and allowed in January, 1925, and all installments maturing on or before July 3, 1931, and within six years from the beginning of total permanent disability had been paid and

the government had not claimed there was any cessation of the total permanent disability nor refused to pay further installments until after the expiration of that time. Under such circumstances, according to the government's theory, the claim of the insured for such later installments would be barred and so would that of his administrator. That would also be an absurd and illogical result and it seems impossible that any theory of law which would bring it about can be sound.

Our theory does not free a claim for total permanent disability benefits from all limitations, for each installment is barred in six years after its maturity. The fact, *if it be such*, that petitioner had adopted *and will continue* a policy of waiving the limitation bar when judgment has been rendered for installments maturing later, has no bearing on the question under consideration. The court determines the *rights* of petitioner and does not undertake to direct its policy in dispensing gratuities.

Petitioner cites (Bf. 22) *U. S.* v. *Sligh,* 24 F. (2d) 636 (CCA 9), but it is interesting to note that in that case all installments maturing late enough to avoid the limitation bar were paid before suit and the suit was concerned only with an attempt to recover those barred by the state statute which then governed in the absence of any federal limitation.

We refuse to be drawn into any argument that our theory would permit a living insured to bring suit at any time, for that is not our case and we make no such contention. Sec. 451, Tit. 38, USCA (see appendix) does not apply to a living insured, but creates a right in the administrator only and a single right, not a continuing one.

II.

While of no particular importance in the computation f time here involved, yet the footnote statement in petitioner's brief (p. 38), to the effect that Sec. 445d, Tit. 8, USC, did not add 90 days to the period of suspension ut merely provided that the claimant should be allowed period of at least 90 days from the date of the mailing f the notice of denial of his claim, within which to bring uit, is unsound. The very statutory provision cited expressly refutes this contention of petitioner by the openng words of the following quotation:

> "In addition to the suspension of the limitation for the period elapsing between the filing in the Veterans' Administration of the claim under a contract of insurance and the denial thereof by the Administrator of Veterans' Affairs or someone acting in his name, the claimant shall have 90 days from the date of the mailing of notice of such denial within which to file suit. * * *"

Sec. 445d, Tit. 38, USCA, 1938 Pocket Supp., p. 135.

Neither does *U. S.* v. *Pastell,* 91 F. (2d) 575, support etitioner's contention, but in stating that said section ntended the claimant should have "at least 90 days," he court did not mean that the 90 days should not be dded to the suspension period.

The claim sued on was filed February 11, 1932, denied ugust 8, 1935, and suit instituted June 29, 1936. The ix-year limitation period was therefore suspended or xtended for as long a time as there was between February 11, 1932, and August 8, 1935, plus 90 days under he statute cited, or 3 years, 5 months and 28 days, plus 0 days, thus establishing a period of at least 9 years,

8 months and 26 days immediately prior to June 29, 1936, during which the maturing installments were not barred. In other words, the administrator has a right to recover all installments falling due on or after October 3, 1926, and before April 22, 1927. It is true that this gives the administrator a very few less installments than the computation in the Court of Appeals opinion, but that has no bearing on the propriety of the reversal of the District Court, for the District Court rejected the claim *in toto* and a reversal was called for if any installment could be recovered.

CONCLUSION.

That the judgment of the Circuit Court of Appeals ought to be affirmed is

Respectfully submitted,

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APPENDIX.

World War Veterans' Act, Sec. 451, Tit. 38, USCA, Pocket Part p. 139; Sec. 26, 43 Stat. 614; as amended July 2, 1926, c. 723, Sec. 3, 44 Stat. 792; July 3, 1930, c. 863, Sec. 2, 46 Stat. 1016:

"The amount of the monthly installments of compensation, yearly renewable term insurance, or accrued maintenance and support allowance which has become payable under the provision of Parts II, III, or IV of this chapter, but which has not been paid prior to the death of the person entitled to receive the same, may be payable to the personal representatives of such person, * * *."

World War Veterans' Act, Sec. 512, Tit. 38, USCA, Pocket part pp. 189, 190, June 7, 1924, c. 320, Sec. 301, 43 Stat. 624; March 4, 1925, c. 553, Sec. 13, 43 Stat. 1309; as amended June 2, 1926, c. 449, 44 Stat. 686; May 29, 1928, c. 875, Sec. 14, 45 Stat. 968; July 3, 1930, c. 849, Sec. 22, 46 Stat. 1001; July 3, 1930, c. 863, Secs. 1, 2, 46 Stat. 1016; June 24, 1932, c. 276, 47 Stat. 334; June 1, 1937, c. 285, 50 Stat. 241:

"* * * All yearly renewable term insurance shall cease on July 2, 1927, except when death or total permanent disability shall have occurred before July 2, 1927: * * *

In case where an insured whose yearly renewabie term insurance has matured by reason of total permanent disability is found and declared to be no longer permanently and totally disabled, and where the insured is required under regulations to renew payment of premiums on said term insurance, and where this contingency is extended beyond the period during which said yearly renewable

term insurance otherwise must be converted, there shall be given such insured an additional period of two years from the date on which he is required to renew payment of premiums in which to reinstate or convert said term insurance as hereinbefore provided:" * * *